Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1509

RELIANCE INSURANCE COMPANY, *Petitioner*

v.

F & D ELECTRICAL CONTRACTORS, INC.; J. H. COPELAND & SONS CONSTRUCTION, INC.; and UNITED STATES OF AMERICA, for the Use and Benefit Of GRAY-BAR ELECTRIC COMPANY, INC., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FCR
BRIEF

Supreme Court Review

Petition Filed:

Construction Contracts—Subcontracts--Breach—Ruling Below (CA 5, 568 F2d 1159): A prime contractor's delays on a construction project amounted to a material breach of the subcontract thus entitling the subcontractor to abandon performance. The subcbontract required the prime to cooperate in scheduling and performing the work so as to avoid interference with the sub's work. There is abundant evidence to support the conclusion that the prime's delay was sufficiently material to consitute a breach of its contractual obligations. Here there were two causes of delay: the government's change orders and the prime's lack of diligence. The prime is liable, under the subcontract, for all additional costs due to change orders and is liable in breach for all damages suffered because of its lack of diligence. Hence, the damages were properly assessed to cover both.

Questions presented: (1) Should a uniform federal rule govern the rights and remedies of subcontractors on government construction contracts to the same extent that the federal rule governs the rights and remedies of a prime with respect to changes in work and delays in completion? (2) Did the court below err in holding that a Government contractor had commited a material breach of a subcontract as a result of delys in completing the project, where the delays were substantially covered by time extensions granted by the Government as a result of change orders and where the sub did not attempt to prove which specific delays were cause by the prime or that the delays had impaired the sub's performance of its work? (3)Can a subcontractor abandon performance becaus of non-specific delays in completion caused by the prime when the subcontract incorporates be reference, and thereby binds the subcontractor to, a contract clause

which prevents the Government caused delays from justifying the contractor's abandonment or withdrawal? (Reliance Insurance Co. v. F & D Electrical Contractors, Inc., Sup Ct. 77-1509, petition filed, 4/21/78)

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RELIANCE INSURANCE COMPANY, *Petitioner*

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F & D ELECTRICAL CONTRACTORS, INC.; J. H. COPELAND & SONS CONSTRUCTION, INC.; and UNITED STATES OF AMERICA, for the Use and Benefit Of GRAY-BAR ELECTRIC COMPANY, INC., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Reliance Insurance Company, prays that a Writ of Certiorari be issued under 28 U.S.C. § 1254 (1) to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 27, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 568 F.2d 1159 and reprinted in Appendix A. The opinion of the United States District Court for the Southern District of Florida is not reported and is reprinted in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 27, 1978, and is reprinted in Appendix C. This Petition for Certiorari was filed within 90 days of that date.

This Court's jurisdiction to review the judgment below is based on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Should a uniform federal rule govern the rights and remedies of subcontractors on government construction contracts to the same extent that the federal rule governs the rights and remedies of a prime contractor with respect to changes in the amount of work and delays in the time of completion?

2. Whether the Court below erred in holding that a government contractor had committed a material breach of a subcontract as a result of delays in the completion of the construction project, where the delays were substantially covered by time extensions granted by the government as a result of government change orders and where the subcontractor did not attempt to prove which specific delays were caused by the contractor or that the delays had impaired the subcontractor's performance of his portion of the work?

3. Whether a subcontractor on a government construction project is permitted to abandon his portion of the construction because of non-specific delays in the time of completion caused by the contractor when the subcontract incorporates by reference, and thereby binds the subcontractor to, a contractual clause which

prevents government caused delays from justifying the contractor's abandonment or withdrawal?

STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Miller Act (40 U.S.C. §§ 270a, *et seq.*) and the Small Business Act (15 U.S. C. § 637) are set forth in Appendix D to this petition.

STATEMENT OF THE CASE

The Small Business Administration (SBA) was the original prime contractor on a government construction project located in Miami, Florida. The contract concerned Phase II of the expansion and modernization of the Miami air route traffic control center. Pursuant to the provisions of Section 8(a) of the Small Business Act (15 U.S.C. § 637(a)), the SBA contracted with a minority contractor, J. H. Copeland & Sons Construction, Inc. (Copeland), to perform the actual functions of the general contractor. The construction commenced on January 15, 1973 and was to be completed in 365 days (January 15, 1974). Copeland entered into a subcontract with F & D Electrical Contractors, Inc. (F & D), which required that company to perform the electrical work for that project. That subcontract was for approximately 25 percent of the prime contract amount.

The contract between Copeland and the SBA incorporated by reference the General Provisions applicable to government construction projects (Standard Form 23-A). Paragraph 3 of the General Provisions (Appendix E, p. 20a) obligated the contractor to accept as binding the change orders issued at any time by the government Contracting Officer which made any change in the work within the general scope of the

contract, including changes which caused an increase in the cost of, or time required for, performance of the work under the contract. Under that clause, if the contractor did not agree to accept the amount of money, if any, proffered by the Contracting Officer to compensate him for the increased cost, the contractor was entitled to seek an equitable adjustment of the contract price and time of completion. The contractor was not free to abandon the contract.

F & D executed a subcontract with Copeland which incorporated by reference the General Provisions of Copeland's contract with the SBA and specifically provided that F & D "shall assume toward the Contractor all of the obligations and responsibilities which the Contractor, by [the Contract] Documents, assumes toward the Owner . . . ." (Appendix F, p. 23a).

The work required under the contract was not completed according to the proposed schedule. Various change orders expanding the amount of work required were issued by the Contracting Officer. As of August 8, 1974, the date F & D ceased work and abandoned the project, various formal contract modifications had been executed which increased the time allowed for completion to June 12, 1974, and increased the contract price as well. Although negotiations were still proceeding with respect to additional time extensions as of August 8, no decisions had yet been reached to extend the time for performance beyond the 513 day periods already allowed.

F & D announced that the failure of the contractor to receive a formal commitment extending the contract completion date beyond June 12, 1974, resulted in F & D no longer having a binding subcontract and therefore F & D abandoned the project on August 8, 1974. In February of 1975 the government executed an additional modification which extended the allowed time for completion an additional 296 days, which extension moved the completion deadline well beyond August 8, 1974, F & D's withdrawal date.

Copeland brought in a substitute electrical subcontractor in August of 1974 to complete that portion of the project left undone by F & D. The completion cost of the electrical work exceeded the balance of the subcontract price, including retainages. F & D, when sued by one of its suppliers, cross-claimed against Copeland and Reliance Insurance Company, the Miller Act Surety, for delay damages allegedly incurred by it prior to August 8, 1974. Copeland cross-claimed against F & D for the completion cost on the electrical work in excess of the remaining contract balance, including retainages. The District Court had jurisdiction of the claims pursuant to U.S.C. § 270b(b). The trial court, after a non-jury trial, ruled that Copeland had breached the terms of the subcontract by being the party substantially responsible for some of the delays in completion, and awarded F & D the delay damages sought and refused to compensate Copeland on its counterclaim for completion costs. The United States Court of Appeals for the Fifth Circuit affirmed, holding that it was not necessary to point to specific delays, which in turn prevented or impeded specific items of work, in order for F & D to prove the existence of a breach of the subcontract and that Copeland caused nonspecific delays which entitled F & D to abandon the subcontract. The petition for certiorari was filed to review that ruling.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Should Have, But Did Not, Enforce a Uniform Federal Rule Governing the Rights and Remedies of Subcontractors on Government Construction Contracts to the Same Extent That the Federal Rule Governs the Rights and Remedies of a Prime Contractor With Respect to Changes in the Amount of Work and Delays in the Time of Completion. The Court Below Erroneously Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

There is no question that, under the terms of the contract with the government, the prime contractor cannot legitimately abandon his performance of the work if the Contracting Officer, pursuant to the "Changes" provision, increases the amount of work required of the contractor. This is true even if the additional work increases the cost of performance or adds to the time required for completion. *See generally, United States* v. *Rice,* 317 U.S. 61, 65 (1942); *Discount Co., Inc.* v. *United States,* 554 F.2d 435, 440 (Ct. Cl.), *cert. denied,* —— U.S. ——, 54 L.Ed.2d 298 (1977); and *McDaniel* v. *Ashton-Mardian Company,* 357 F.2d 551, 514-15 (9th Cir. 1966). Continued performance of the contract is in the public interest, and the end result is a uniform rule which in general holds that government caused delays do not justify abandonment of further performance by the contractor.

The Court of Appeals for the Fifth Circuit has refused to make equally applicable to the subcontractor this federal rule with respect to delays, and this refusal has occurred despite the fact that the General Provisions of the prime contract have been clearly and unequivocally incorporated into the subcontract. Under the decision of the Court of Appeals, delays which are the natural and proximate result of govern-

ment-imposed change orders can never excuse further performance by the prime contractor, but those same delays may serve to excuse further performance by subcontractors and justify their abandonment of the project. This ruling clearly frustrates the public interest in continued performance, especially when it is noted that the bulk of the work required under the contract in suit was to be performed by the subcontractors on the project. The Contractor is put in an impossible situation and the parties to the contract and subcontract are denied the benefits of a uniform rule which will serve to avoid the pitfalls which result from an attempt to apply an *ad hoc* rule. *See F. D. Rich Co.* v. *Industrial Lumber Co.,* 417 U.S. 116, 127 (1974). This case presents an important federal question concerning the interpretation of federal law as it applies to widely used standard form contracts and subcontracts for government construction. Petitioner submits that the United States Court of Appeals was in error in refusing to adopt a uniform rule which will bind both the prime contractor and the subcontractor to remain on the job and complete the project even if delays are experienced in the time for completion.

II. The Decision of the Court of Appeals, Which Held That a Subcontractor on a Government Project Which Underwent Significant Government-Imposed Changes and Time Extensions Could Establish a Material Breach of the Subcontract Which Excused Further Performance Based on the Mere Existence of Delays in Completion Without Establishing How Those Delays Prejudiced His Performance, Conflicts With Decisions of the United States Court of Claims and Other Courts of Appeal, and Decides an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The United States Government, through its various departments, bureaus and agencies, is involved in billions of dollars of construction on thousands of projects throughout the United States every year. In accordance with standard government contracting procedure, the general contractor is required to assent to the General Provisions for Construction Contracts, Standard Form 23-A, which requires the general contractor to agree to perform changes in, or additions to, the project at any time during the course of construction when ordered to do so by the Contracting Officer. The Contractor is not free to abandon the project or refuse to perform the required extra work because his costs or time of performance will be increased. Paragraph 3 of the General Provisions (App. E, p. 20a) sets forth the procedures by which the contractor will be protected if he can establish that the required changes have in fact increased his costs of performance or caused him actual delay in the time of completion.

The portions of the prime contract which prevent potentially expected cost increases or completion delays from serving as a predicate for a claimed breach of contract applied with equal force to the subcontract

between Copeland and F & D. Article 11 of the subcontract (App. F, p. ——) provided that F & D would assume toward Copeland all the obligations Copeland had assumed toward the government. These responsibilities and obligations towards the contractor should have barred F & D's argument that a material breach of the subcontract had occurred which would excuse further performance based merely on a delay in the estimated completion date of the project.

Cases arising out of delays in government construction projects have consistently held that a contractor which had experienced delays in performing government contracts could not establish the *existence* of a breach of contract by merely proving government caused delays—a breach of contract is not proved until the contractor establishes (1) a delay in performance (2) caused by the government's failure to perform an obligation defined by the contract (3) which failure was solely responsible for preventing the contractor from performing a specific item, or specific items, of work under the contract, and (4) thereby damaged the contractor. *See Bruno Law And Richard Marlink, Trustees in Dissolution for Daniel J. Cronin, Inc.* v. *The United States,* 195 Ct. Cl. 370, 381-87 (Ct. Cl. 1971); *Commerce International Company* v. *United States,* 338 F.2d 81, 89-90 (Ct. Cl. 1964); *United States* v. *Citizens & Southern Nat. Bank of Atlanta, Ga.,* 367 F.2d 473, 480-81 (4th Cir. 1966); and *McDaniel* v. *Ashton-Mardian Company,* 357 F.2d 511, 514-15 (9th Cir. 1966). Delay in the abstract is meaningless, and proof that the completion of a construction project was behind schedule proves nothing—it does not support cancellation of a subcontract; it does not prove that subcontractor's obligation to complete

his portion of the work has expired; and it does not prove that the subcontract has been breached in a manner which would justify abandonment of the project.

The Court of Appeals rejected this rule and the cited cases in affirming the judgment awarded to the subcontractor in this instance. In its opinion the Court of Appeals acknowledged that the subcontractor had not attempted to prove which part of the delay, if any, was the responsibility of Copeland as opposed to the responsibility of the government. The rationale for ignoring the rule of *Bruno Law, supra,* and *Commerce International, supra,* was based on the interpretation that the rule established in those cases was applicable *only* to the amount and quality of proof necessary to allow an award of money damages, and held that it did not apply to the question of whether a material breach had in fact occurred. As the Court of Appeals concluded on this issue:

> [*Bruno Law and Commerce International*] concerned the proof necessary to establish not merely the fact of breach of contract but the amount of damages assessable against the United States as a result. *The exacting rules conditioning the determination of damages against the sovereign for its delay do not prescribe what constitutes a breach of contract by a private party for purposes of excusing further performance.* [Emphasis supplied.]

568 F.2d at 1161.

The conclusion of the Court of Appeals ignores the holdings of those cases and, therefore, results in a decision which is in direct conflict with them. A brief extract from each of those opinions will demonstrate

that the amount and specificity of proof required was necessary to establish the *existence* of a material breach of the contract, not to determine the amount of damages which would be recovered if a breach was otherwise proven. In *Bruno Law,* 195 Ct. Cl. at 382, the failure of the plaintiff to establish a breach of contract in the first instance was noted in the following language:

> The evidence, however, demonstrates that many of the incidents relied on by plaintiff were isolated and nonsequential, and therefore could not possibly have caused any significant delay in the overall progress of the project. *Furthermore, with respect to the great bulk of such incidents, plaintiff has failed to prove, or indeed even to attempt to prove, the crucial fact of the specific extent of the alleged wrongful delay to the project operations caused thereby. For the most part, it has not even attempted a reasonable approximation based upon some rational theory. Instead, the plaintiff typically relies on each instance as constituting wrongful action which 'contributed to the delayed completion' of the particular building or installation 'and of the project as a whole,' without indicating whether such 'contribution' was one day, thirty days, or any reasonably accurate period of time.* Plaintiff simply takes the original and extended completion dates, computes therefrom the intervening time or overrun, points to a host of individual delay incidents for which defendant was allegedly responsible and which 'contributed' to the overall extended time, and then leaps to the conclusion that the entire overrun time was attributable to defendant. [Emphasis supplied].

Similarly, the plaintiff did not prove a material breach of the contract under consideration in *Com-*

merce International, 338 F.2d at 89, because the delays which occurred were not shown to have substantially interfered with the progress of the work required of the plaintiff:

> *Causation.* Similarly plaintiff has not persuaded us that the Commissioner was wrong in his alternative conclusion that any undue delays on defendant's part (with respect to the parts) have not been shown to have interfered with production. *Plaintiff must admit that, no matter how unreasonable the Government's delay, there can be no recovery without proof that that delay caused material damage.* [Citations omitted]. In the evidentiary record made in this case there is much to support the Commissioner's determination that such proof has not been made.
>
> * * *
>
> *The primary lack is plaintiff's complete failure to link its accountants' general survey of the amounts of time taken by the Government (in the requisitioning process) with the course of the plaintiff's operations.*
>
> * * *
>
> Without any specific proof, we are asked to assume that plaintiff's serious production difficulties through part shortages were all due to undue Government delays—even though other substantial causes for these difficulties have been advanced, *much of the defendant's delay cannot on any view be deemed unreasonable, and there could not have been any injurious delay-effect with respect to the large number of plaintiff's requests (for parts) which were unnecessary.* Plaintiff has contended itself with broad generalities when specificity is essential. [Emphasis supplied].

If F & D had been able to prove that specific omissions of Copeland caused it specific, unreasonable de-

lays in the performance of the subcontract, compensatory damages for the delay would have been available under the subcontract. Instead of adopting this recognized legal principle, the Court of Appeals ignored the very real differences between delay, breach of contract, and material breach of contract which excuses further performance, and help that the subcontractor could legally abandon a partially completed project when the project was, by no substantial fault of the contractor, delayed beyond the original time of completion.

Petitioner submits that the decision of the United States Court of Appeals for the Fifth Circuit on the standard of proof required to establish a material breach of a government contract which would serve to excuse further performance by the subcontractors conflicts with decisions of the United States Court of Claims and other Courts of Appeal, and that this Court should resolve the issue presented.

III. The Decision Court of Appeals, Which Held That the Portion of the "Disputes" Clause, Which Requires the Contractor to "Proceed Diligently With the Performance of the Contract" in the Event of a Dispute Over a Delay in the Time of Completion Was Not Incorporated by Reference Into the Subcontract, Conflicts With a Decision of Another Court of Appeals and Presents an Important Federal Question Which Has Not Been, But Should Be, Decided by This Court.

The last sentence of paragraph (a) of the "Disputes" Clause of the General Provisions for construction contracts (App. E, p. 20a) provides that "the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision" pending a final decision on a dispute concerning a question of fact under the con-

tract. This clause, in conjunction with the "Changes" provision (App. E, p. 20a), requires a prime contractor to remain and complete his performance under a government construction project when the Contracting Officer orders work which was not required under the terms of the original plans and specifications. *See United States* v. *Rice,* 317 U.S. at 65-66. Although the subcontract between Copeland and F & D specifically incorporates by reference, and binds the subcontractor to, the "Contract Documents between the Owner and Contractor," the Court of Appeals ruled as a matter of law that this portion of the Disputes Clause of the General Provisions was not incorporated by reference. *See United States, Etc.* v. *J. H. Copeland & Sons,* 568 F.2d at 1160. Had the Court of Appeals ruled that F & D was bound by its subcontract to "proceed diligently with the performance of the contract," the abandonment of the job by F & D on August 8, 1974, would not have been excused and would in fact amount to a material breach of its obligations under the subcontract.

The decision of the United States Court of Appeals for the Fifth Circuit on this point is in conflict with the decision in *McDaniel* v. *Ashton-Mardian Company,* 357 F.2d 511 (9th Cir. 1966), which adopted the language of the District Court in holding that the subcontract had sufficiently incorporated the General Provisions of the government contract to prevent the subcontractor from relying on delays occasioned by government-imposed change orders for the recovery of "anything other than the direct costs of the additional work and equitable time extensions for any additional time required for performance of the changes." 357 F.2d at 516.

The Court of Appeals in the cases below relied on its previous holdings in *United States* v. *Fryd Construction Corporation,* 423 F.2d 980 (5th Cir. 1970), and *H. W. Caldwell & Son, Inc.* v. *U.S. For John H. Moon & Sons, Inc.,* 407 F.2d 21 (5th Cir. 1969), to justify its conclusion that the subcontractor could justifiably abandon the project if a time delay was experienced as a result of government change orders issued to the contractor. A review of those cases clearly establishes that they involve issues completely different from those presented in this action and provide no basis for the conclusion of law reached by the Court of Appeals. There was no challenge in the case below to the right of the subcontractor to institute suit under the Miller Act—what was challenged was F & D's right to abandon the project before it was completed.

Petitioner submits that the decision of the Court of Appeals, if allowed to stand, will substantially disturb relationships between the contractor and his subcontractors on government construction projects, and the lack of a uniform rule among the circuits on this issue will raise serious questions about the rights and liabilities of a contractor who is required to accept and perform government change orders. This serious question of federal law should be resolved by this Court.

CONCLUSION

For the reasons set forth above, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 75-253-Civ-FF

UNITED STATES OF AMERICA for the use and benefit of GRAYBAR ELECTRIC COMPANY, INC., a New York Corporation,
Plaintiff,

vs.

J. H. COPELAND & SONS CONSTRUCTION, INC., a corporation; RELIANCE INSURANCE COMPANY, a corporation; and F & D ELECTRICAL CONTRACTORS, INC., a corporation,
Defendants.

Findings of Fact and Conclusions of Law

(Filed February 23, 1976)

The use-plaintiff, GRAYBAR ELECTRIC COMPANY, INC., (hereinafter referred to as GRAYBAR) brought this action under the Miller Act, 40 U.S.C. §§ 270a-270d, as a supplier of materials to the subcontractor, F & D ELECTRICAL CONTRACTORS, INC. (hereinafter referred to as F & D). The prime contractor on the government construction was the defendant, J. H. COPELAND & SONS CONSTRUCTION, INC. (hereinafter referred to as COPELAND), and the Miller Act bond was written by the defendant, RELIANCE INSURANCE COMPANY (hereinafter referred to as RELIANCE). F & D filed a crossclaim against COPELAND and RELIANCE for sums allegedly due as a result of labor and materials furnished by F & D to the government project in question. COPELAND, in turn, filed a crossclaim against F & D for damages occasioned by F & D's alleged breach of the subcontract between these parties.

Prior to the non-jury trial of this matter, the claim of GRAYBAR against RELIANCE and COPELAND was settled and GRAYBAR recovered the sum of $13,000.00; on the stipulation

of the parties, the claim of GRAYBAR against F & D was dismissed without prejudice. This case, therefore, proceeded to trial on the crossclaims of the defendants alone.

COPELAND was the prime contractor on the government project known as Modernization and Expansion of ARTCC (Phase II) (hereinafter referred to as the project). F & D entered into a subcontract with COPELAND dated January 29, 1973, wherein F & D agreed to furnish electrical work, including labor and materials, for the project in the initial base amount of $525,000.00. Article 3 of the subcontract provided that the work would commence on January 15, 1973 and would be completed on or before January 15, 1974, with a penalty for delays at $500.00 per day.

Although the subcontract was scheduled for completion on or before January 15, 1974, the project itself was behind schedule on that date and, consequently, the subcontract was not completed. By letter dated January 22, 1974, COPELAND advised F & D that the prime contract had been extended by and through Modification No. 3 and that the revised completion date for the project was June 8, 1974. F & D, by its own admission, acceded to Modification No. 3 and remained on the project through June 8 and thereafter until August 8, 1974.

During those months encompassed by Modification No. 3, F & D asked COPELAND to process certain claims through the government for cost overruns and expenses for delays which F & D had incurred on account of the extension of the prime contract. COPELAND complied with F & D's request, and, by letter dated July 18, 1974, informed F & D that the government had approved funds for the 144 extension authorized by Modification No. 3.

On July 23, 1974, F & D, COPELAND and representatives of the SBA held a meeting. At that gathering, F & D announced that time for performance of its subcontract had expired; that no new time for completion of that subcontract had been agreed upon; and that F & D had received

no compensation for its extra time on the job. F & D further stated that it could not be expected to continue to furnish labor and materials to the project without some contractural arrangement between it and COPELAND as to a new completion date of the subcontract, together with adequate compensation for labor and materials previously furnished and to be furnished, should the job continue.

The only concrete result of the July 23 meeting was the agreement between F & D and COPELAND that F & D would supply three men on the job to continue electrical work for a reasonable time pending negotiations of F & D's demands. Two weeks passed, however, without any affirmative action on the requests of F & D. On August 7, 1974, COPELAND demanded that F & D supply six electricians to the project; F & D refused. Finally, on August 8, F & D withdrew from the job.

There is no disagreement among the parties to this lawsuit that the project in question was crippled by lengthy and costly delays. The parties have differing opinions, however, as to the responsibility for those delays and the legal duties of F & D relative to those delays. F & D contends

1) that, on August 8, 1974, the time for completion of the subcontract, as extended by Modification No. 3, had expired;

2) that COPELAND had materially breached the subcontract by creating lengthy and costly delays; and

3) that F & D was justified, therefore, in abandoning the subcontract.

COPELAND counters the arguments of F & D and asserts

1) that the subcontract incorporated by reference the provisions of the general contract;

2) that, under the incorporated terms of the prime contract, F & D was obligated to perform its electrical work regardless of any delay which the government might occasion in regard to changes in the project;

3) that the delay of the completion of the subcontract beyond January 24, 1974, was caused in substantial part by the actions of the government and by other forces beyond COPELAND's control; and

4) that, therefore, F & D breached its subcontract by abandoning the project on August 8, 1974.

In order to resolve the legal issues in the case at bar, this Court must consider two questions. The first question is whether the subcontract between COPELAND and F & D incorporated, by reference, the provisions of the prime contract between the United States and COPELAND, specifically General Provision Three of Standard Form 23-A which provides:

> The Contracting Officer may, at any time, by written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contract modified in writing accordingly.

Having reviewed the various documents and considered the evidence adduced at trial, this Court is constrained to answer this first question in the affirmative. Article One of the subcontract provides that the agreement between the owner and the contractor, including the general and special conditions applicable thereto, is incorporated by reference into the subcontract and, therefore, those provisions become applicable to the subcontract. As a result of this incorporation by reference, F & D became obligated to abide by the terms and conditions of the general contract with respect to all applicable provisions, except the "disputes" clause contained in General Provision Six. *See H. W. Caldwell & Son, Inc.* v. *U.S. for the use of John H. Moon & Son, Inc.*, 407 F.2d 21 (5th Cir. 1969); *McDaniel* v. *Ashton-Mardian*

Co., 357 F.2d 511 (9th Cir. 1966). This Court also notes that, prior to the date that F & D left the project, F & D asked COPELAND to process through the government certain claims for cost overruns and expenses for delay which F & D had incurred in connection with its performance under the subcontract. The actions of F & D in this regard constituted an express recognition of the fact that the subcontract incorporated, by reference, the provisions of the prime contract between the United States and COPELAND.

Having concluded that the general provisions of the prime contract, with the exception of the "disputes" clause, were incorporated by reference into the subcontract, this Court is of the opinion that, on August 8, 1974, it would have been a breach of the subcontract for F & D to abandon work if the delays, which F & D now asserts to justify its actions, were occasioned in substantial part by government-ordered changes or other factors reasonably beyond COPELAND's control. If, on the other hand, those delays were caused in substantial part by COPELAND and were of a nature that they constituted a material and fundamental breach of the subcontract, then F & D had a right to abandon the subcontract and refuse to complete its electrical work on the project. The second question which this Court must resolve, therefore, is who, or what, was substantially responsible for those delays which prompted F & D on August 8, 1974, to completely abandon its contractural obligations to COPELAND.

If there are two facts which surface from the extensive evidence and lengthy testimony in the case *sub judice*, they are, *first*, that the project in question was subject to serious delays before the ink was even dry on the prime contract and, *second*, that COPELAND was, in substantial part, the cause of those delays. The evidence is clear that COPELAND did not get subcontractors signed up for the project until many weeks after the execution of the prime contract. The evidence is also clear that COPELAND was continuously be-

hind in the general construction areas of the project and, therefore, that F & D was literally unable to install conduits, pull wires, and other work because the buildings and areas involved were not structurally ready for same. Although some of the delays on the project were beyond the control of COPELAND and were recognized as such by the government, the evidence reveals that most of the delays were a direct result of COPELAND's inability to move construction forward as scheduled, to properly coordinate the subcontractors, and to provide the type of supervision necessary for such a project.

Furthermore, the testimony and the evidence show that, even in the face of COPELAND's dehabilitating delays, F & D "walked the last mile" in an attempt to reach an agreement for the completion of electrical work at the project. With no government extensions in existence, F & D stayed on the job after the July meeting and maintained three men in the hope that some decisions would be made as to a final completion date and as to additional compensation for "delay overhead". The record reveals that, instead of affirmative action on its demands, F & D received a telegram on August 7 in which COPELAND demanded that F & D supply six men to the project. At that point, this Court is of the opinion that F & D was justified in abandoning the job; after all, enough is enough.

In summary, this Court concludes that, even though the terms of the prime contract were incorporated by reference into the subcontract, COPELAND, and not the government, was substantially responsible for the delays which caused F & D to abandon its work under the subcontract. This Court further concludes that the delays occasioned by COPELAND were such as to go to the very heart of the subcontract and, therefore, were such as to amount to a material breach of that subcontract. It is the holding of this Court, therefore, that COPELAND materially breached its subcontract with F & D and that F & D was thereby justified

in abandoning the project on August 8, 1974. Accordingly, this Court now enters judgment in favor of F & D on both its crossclaims against COPELAND and RELIANCE and on COPELAND's crossclaim against F & D.

Turning now to the question of damages, this Court makes the following awards to F & D on its crossclaim against COPELAND and RELIANCE:

1) The sum of $90.00 a day for the 144 days from the original date for the completion of the subcontract until June 8, 1974, or damages in the amount of $12,960.00;

2) The sum of $90.00 a day for the forty-four (44) days from June 8, 1974, until August 8, 1974, or damages in the amount of $3,960.00;

3) Retainages in the amount of $47,418.67.

The total award to F & D, therefore, is $64,338.67. F & D concedes that this award should be diminished by $13,000.00, the sum paid by RELIANCE to GRAYBAR in settlement of GRAYBAR's claim. This court, therefore, computes the total damages awardable in favor of F & D and against COPELAND and RELIANCE as $51,338.67.

This Court notes that F & D makes no claim for the unpaid portion of the base price of the subcontract, or $33,512.72. F & D admits that this sum is properly applied toward COPELAND's expenses in completing the electrical work on the project. This Court also notes that F & D, in its post-trial brief, concedes that, under the Miller Act, it cannot recover its surety bond premium in the amount of $10,500.00 against RELIANCE. As to COPELAND, this Court holds that, under the provisions of the subcontract, the surety bond premium was the sole obligation of F & D and, therefore, F & D cannot recover the cost of that premium against COPELAND.

Finally, this Court concludes that COPELAND shall recover nothing under its crossclaim against F & D. This Court

holds that COPELAND breached the terms of the subcontract with F & D and, therefore, is not entitled to set-off the costs of completing the electrical work on the project against F & D's recovery here.

This Court will enter final judgments on the crossclaims of the respective parties in accordance with the findings of fact and conclusions of law stated herein.

DONE AND ORDERED at Miami, Florida, this 19th day of February, 1976.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

(CAPTION OMITTED IN PRINTING)

(FILED FEBRUARY 23, 1976)

Final Judgment

In accordance with the Findings of Fact and Conclusions of Law which this Court has entered in this case, this Court hereby enters a Final Judgment in favor of F & D ELECTRICAL CONTRACTORS on its crossclaim against J. H. COPELAND & SONS CONSTRUCTION, INC. and RELIANCE INSURANCE COMPANY, in the amount of FIFTY-ONE THOUSAND THREE HUNDRED AND THIRTY-EIGHT DOLLARS AND SIXTY-SEVEN CENTS (51,338.67). Further it is—

ORDERED AND ADJUDGED that J. H. COPELAND & SONS CONSTRUCTION, INC. shall recover nothing on its crossclaim against F & D ELECTRICAL CONTRACTORS, INC. Further, it is—

ORDERED that costs in this action shall be taxed at a later date upon filing of appropriate Bill of Costs.

DONE AND ORDERED at Miami, Florida this 23rd day of February, 1976.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

March 3, 1978

UNITED STATES of America, for the Use and Benefit of GRAY-BAR ELECTRIC COMPANY, INC., a New York Corporation, *Plaintiff*,

v.

J. H. COPELAND & SONS CONSTRUCTION, INC., a corporation, et al., *Defendants-Cross Defendants-Appellants*,

v.

F & D ELECTRICAL CONTRACTORS, INC., *Defendant-Cross Plaintiff Appellee.*

No. 76-2053.

• • •

Appeals from the United States District Court for the Southern District of Florida.

Before COLEMAN, HILL and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge.

This appeal challenges the trial court's conclusion that J. H. Copeland & Sons Construction, Inc. ("Copeland"), a Small Business Act, 15 U.S.C. § 637(a), "minority" contractor, was substantially responsible for delays in the construction of a United States Aviation facility adjacent to the Miami International Airport and thereby breached its contract with F & D Electrical Contractors, Inc. ("F & D"), the electrical subcontractor on the project.[1] Finding that there was substantial evidence to support the factual conclusions of the trial court, and that the opinion was consonant with the applicable rules of law, we affirm.

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[1] The case was tried on the basis of cross-claims between F & D, Copeland, and Reliance Insurance Company, Copeland's surety under the Miller Act, 40 U.S.C. §§ 270a-270d.

I.

Appellant contends that the trial court was clearly erroneous in concluding that Copeland materially breached its contract by reason of the delay. It is contended that the delay, even if material, does not go to the heart of the contract so as to constitute a breach. See, *U.S. for Use and Benefit of Pickard v. Southern Const. Co.*, 6 Cir. 1961, 293 F.2d 493, *rev'd in part and remanded on other grounds*, 1962, 371 U.S. 57, 83 S.Ct. 108, 9 L.Ed.2d 31.

In an action between private parties, even though the contract is governed by the Miller Act, it suffices to show that the contractor caused a substantial delay in performance, that the contract terms forbade such a delay, and that the plaintiff was injured as a result. See, *Steenberg Construction Co. v. Prepakt Concrete Co.*, 10 Cir. 1967, 381 F.2d 768; *Bruno Law and Richard Marlink v. United States*, Ct.Cl. 1971, 195 Ct.Cl. 370.

The trial court found that the subcontract between Copeland and F & D incorporated by reference the terms of the general contract between Copeland and the government.[2] Both the subcontract and the general contract provided that the work to be completed on or before January 15, 1974. F & D ceased work on August 8, 1974, 188 days after construction was originally due to be completed, but when it was still not finished. The trial court concluded that, if the delay had been occasioned in substantial part by government-ordered changes or other factors reasonably beyond Copeland's control, then F & D had breached the subcontract by stopping work. However, the court found that the delays were caused in substantial part by Copeland, and that these delays constituted a material breach of the sub-

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[2] Only the "disputes" clause, which is not relevant here, was not incorporated. See, *H. W. Caldwell & Son, Inc.* v. *U. S. for the use of John H. Moon & Sons, Inc.*, 5 Cir. 1969, 407 F.2d 21.

contract, thereby justifying F & D in abandoning the project on August 8, 1974.

Article 12.10 of the subcontract provides "The Contractor shall cooperate with the Subcontractor in scheduling and performing his Work to avoid conflicts or interference in the Subcontractor's Work." Additionally, it is an implied condition of every government construction contract that neither party will hinder the performance of the other. *Bruno Law, supra.*

The contract between Copeland and the government was subject to the vicissitudes endemic to government contracts. F & D's subcontract with Copeland explicitly provided and necessarily implied that F & D would bear with any delays caused by the government. But neither the contract nor the nature of the work obliged F & D to suffer the additional cost that resulted from delay due to Copeland's inexpertness in performing its work and in discharging its own contractual duties to subcontractors.

There is an abundance of evidence to support the conclusion reached by the trial court that Copeland's delay was sufficiently material and prejudicial to constitute a breach of its contractual obligations,[3] and that F & D was injured as a result. Despite the various time extensions resulting from the government change orders, which appel-

[3] The appellant challenges the finding that "F & D was literally unable to install conduits, pull wires and other work because the building and areas involved were not structurally ready for the same." It is apparent that this conclusion was based upon the testimoney of Mr. Diaz, F & D's President. Appellant contends that this testimony referred only to the UPS building, where delay was attributable to government change orders. However, although Mr. Diaz testified about change order problems and cited the UPS area as an example, he concluded that the problem that areas were not structurally ready for F & D's work "was occurring primarily throughout the whole job." Trial transcript, February 6, 1976, at 179.

lant contends account for the vast proportion of the delay, there were no extensions in existence when F & D finally left the job on August 8, 1974. Moreover, as the trial court found, "F & D walked the last mile" by continuing work without any assurance of compensation. See, *U. S. for Use of F. E. Robinson Co. of N. C. Inc. v. Alpha Continental,* D.N.C. 1967, 273 F.Supp. 758, *aff'd* 4 Cir. 1969, 406 F.2d 561, *cert. denied,* 1969, 395 U.S. 922, 89 S.Ct. 1774, 23 L.Ed. 2d 239.

Appellant also contends that F & D was required to prove the specific extent of the alleged wrongful delay caused by Copeland itself, distinguished from delays occasioned by the government. However, the cases relied upon, *Bruno Law, supra; Boyajian v. U. S.,* 1970 191 Ct.Cl. 233, 423 F.2d 1231; *Wunderlich Contracting Co. v. U. S.,* 1965, 173 Ct.Cl 180, 351 F.2d 956; *Commerce International Co. v. U. S.,* 1964, 167 Ct. Cl. 529, 338 F.2d 81; and, *Great Lakes Construction Co. v. U. S.,* Ct.Cl. 1942, 95 Ct.Cl. 479, all involved claims by contractors against the United States for damages sustained as a result of delay caused by the government. They concerned the proof necessary to establish not merely the fact of breach of contract but the amount of damages assessable against the United States as a result. The exacting rules conditioning the determination of damages against the sovereign for its delay do not prescribe what constitutes a breach of contract by a private party for purposes of excusing further performance.

Hence, we are unable to find the trial court erred in concluding that Copeland breached its subcontract with F & D, and that this excused F & D's failure to continue work after August 8, 1974.

II.

With respect to the amount of damages suffered, in a suit between private parties for breach of a construction contract by delay, the party who seeks to collect damages has the burden of proving the extra costs it incurred as a result

of the breach. *United States v. Citizens & Southerns Nat. Bank of Atlanta, Ga.*, 4 Cir. 1966, 367 F.2d 473, 480; *Lichter v. Mellon-Stuart Co.*, 3 Cir. 1962, 305 F.2d 216. If there are factors for which the defendant is responsible and factors for which it is not, the plaintiff must provide a reasonable basis for apportioning the damages. *United States v. Citizens & Southerns, supra; Lichter v. Mellon-Stuart Co., supra;* see also, *Wunderlich Contracting Co. v. United States, supra.* However, where the defendant is responsible for all of the several sources of delay, it would serve no purpose to require the plaintiff to apportion the amount of damages caused by each.[4]

Here, there were only two causes of the delay: the government change-orders and Copeland's lack of diligence. Copeland is liable under the subcontract for all additional costs sustained as a result of government change-orders.[5] Copeland is liable in breach of contract for all damage suffered as a result of its own lack of diligence. Hence, regardless of the amount of damage attributed to each cause, Copeland is liable for the whole. The damages were properly assessed to cover both. Accordingly, the judgment of the district court is AFFIRMED.

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[4] In *Wunderlich, supra,* there was an equitable adjustment clause, but a cause for which the government was not legally responsible, the Korean War, was a major source of delay. Hence, apportionment of damages was required.

[5] Provision three of the general contract, as incorporated by reference in the subcontract, provides in relevant part:

> The Contracting Officer may, at any time . . . make any change in the work within the general scope of the contract . . .
>
> • • • • • •
>
> If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work . . . an equitable adjustment shall be made and the contract modified accordingly. . . .

APPENDIX C

(CAPTION OMITTED IN PRINTING)

Filed March 29, 1978

Appeals from the United States District Court for the Southern District of Florida

Before COLEMAN, HILL and RUBIN, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to appellee, the costs on appeal to be taxed by the Clerk of this Court.

March 3, 1978.

APPENDIX D

15 U.S.C. § 687

Operation and regulation of companies

COOPERATION WITH BANKS AND OTHER FINANCIAL INSTITUTIONS

(a) Wherever practicable the operations of a small business investment company, including the generation of business, may be undertaken in cooperation with banks or other investors or lenders, incorporated or unincorporated, and any servicing or initial investigation required for loans or acquisitions of securities by the company under the provisions of this Act may be handled through such banks or other investors or lenders on a fee basis. Any small business investment company may receive fees for services rendered to such banks and other investors and lenders.

40 U.S.C. §2270a

Bonds of contractors for public buildings or works: waiver of bonds covering contract performed in foreign country

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair, of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the

work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Reve-

nue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

40 U.S.C. § 270b

Same: rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

APPENDIX E

General Provisions

(Construction Contract)

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3. CHANGES

(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

(i) In the specifications (including drawings and designs);

(ii) In the method or manner of performance of the work;

(iii) In the Government-furnished facilities, equipment, materials, services, or site; or

(iv) Directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required

for, the performance of any part of the work, under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: *Provided, however,* That except for claims based on defective specifications, no claim for any change under (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required: *And provided further,* That in the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

(e) If the Contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under (b) above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Government. The statement of claim hereunder may be included in the notice under (b) above.

(f) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

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6. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written

appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Dispute clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

APPENDIX F

Article 11

Subcontractor's Responsibilities

11.1 The *Subcontractor shall be bound to the Contractor by the terms of this Agreement and of the Contract Documents between the Owner and Contractor, and shall assume toward the Contractor all the obligations and responsibilities which the Contractor, by those Documents, assumes toward the Owner,* and shall have the benefit of all rights, remedies and redress against the Contractor which the Contractor, by those Documents, has against the Owner, insofar as applicable to this Subcontract, *provided that where any provision of the Contract Documents between the Owner and Contractor is inconsistent with any provision of this Agreement, this Agreement shall govern.*